Supreme Court, U.S.
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No. 00-1502

IN THE

Supreme Court of the United States

DOUG GRANT, INC., *et al.*,

Petitioners,

v.

GREATE BAY CASINO CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GREATE BAY HOTEL AND CASINO, INC. T/A "SANDS HOTEL & CASINO"

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Greate Bay Hotel and Casino, Inc. t/a "Sands Hotel & Casino" ("Sands"), is owned by GB Holdings, Inc., a Delaware Corporation, which is traded on the American Stock Exchange ("GBH"). By virtue of a certain repurchase agreement, American Real Estate Partners, L.P., a Delaware Limited Partnership, which is publicly traded on the New York Stock Exchange, might be considered to have more than a 10% beneficial interest in the stock of GBH. In addition, certain high yield investment funds managed by affiliates of Merrill Lynch may own collectively more than 10% of the stock of GBH.

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REASONS FOR DENYING THE WRIT

1. Petitioners seek an advisory opinion regarding the disqualification issue under 28 U.S.C. § 455 ("Section 455") because the Third Circuit affirmed the granting of the motion to dismiss, exercising plenary review. Review of the Section 455 question would not disturb the legal basis for the judgment of the courts below unless review was expanded to cover the underlying legal issues of the validity of countermeasures utilized against blackjack card counters despite New Jersey Supreme Court and Casino Control Commission ("CCC") rulings against the interests of Petitioners. Note 1, *infra*.

2. The "emergency" motion for a remand for an evidentiary hearing on the Section 455 question lacked merit.

3. Neither novel legal issues nor conflicting decisions are presented because the Third Circuit also concluded that the "emergency" motion was "without merit." Pet. App. at 34. Thus, Petitioners are not asking this Court to review a conflict with *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) or its progeny, but a decision that the allegations of the "emergency" motion raised no concerns under *Liljeberg*.

4. The disposition of the Petitioners to couch "their arguments in dramatic hyperbole obfuscating the real issues" and "mischaracteriz[ing] the facts", which disturbed the Third Circuit, continues here unabated. Pet. App. at 24.

I.

THE COURT SHOULD DECLINE THE INVITATION TO RENDER AN ADVISORY OPINION ON THE SECTION 455 QUESTION.

Just before argument in the Third Circuit, Petitioners filed an "Emergency Motion for Evidentiary Hearing to Determine Whether the Hon. Joseph E. Irenas Had or Has an Undisclosed Conflict of Interest or Financial Interest in the Outcome of the Case" (the "Motion"). The Third Circuit "considered [the Motion] carefully and [denied it] as . . . without merit" (Pet. App. at 34) and, in exercising plenary review where no factual issues were decided by the District Court, agreed with the legal basis for the F.R. Civ. P. 12(b)(6) dismissal.

Suppose instead that the Third Circuit had remanded for an evidentiary hearing and that another District Judge had concluded that Judge Irenas should have recused himself pursuant to Section 455. Under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the next question for the District Court would have been whether to vacate the judgment pursuant to F.R. Civ. P. 60(b)(6). 486 U.S. at 863. In addressing this issue, this Court noted, "there is surely room for harmless error" (486 U.S. at 862) and that "Rule 60(b) relief is . . . neither categorically available nor categorically unavailable for all Section 455 violations." 486 U.S. at 864. Rule 60(b) relief would be categorically unavailable here because the Third Circuit determined that the judgment was correct as a matter of law. Accordingly, given the legal determination by the Third Circuit, and the limitation of the Petition to the Section 455 question, the decision on the merits by the Third Circuit would be

unaffected by any purely advisory opinion this Court might render limited to the Section 455 question.[1]

II.

THE MOTION WAS MERITLESS.

Turning to the Motion, nearly two years after the decision by Judge Irenas, Petitioners wrote to Judge Irenas on March 14, 2000, asked if he had performed consulting work for the CCC or the Division of Gaming Enforcement ("DGE"), basing the inquiry on an "unconfirmed report" by an undisclosed individual, and if he or his former firm

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1. No reason exists to expand review to include the blackjack questions. An array of authority has rejected Petitioners' central claim (Pet. App. 53) that the use of the shuffle at-will after any round of play card counter countermeasure authorized by N.J.A.C. 19:47-2.5(a) violates N.J.S.A. 5:12-115, which prohibits use of cards that have "been marked . . . or placed in a condition . . . which tends to . . . alter the normal random selection . . ." The contention is that shuffling after a round of play when the remaining cards in the deck are favorable to card counters alters the odds of the game. Pet. App. at 42-43. Petitioners overlook that the game is how the CCC defines it under the Casino Control Act, N.J.S.A. 5:12-1 *et seq.* (the "Act"), which gives the CCC plenary authority to define and limit the rules of games. N.J.S.A. 5:12-70(f). The authorities rejecting that claim originating in Petitioners "test case" brought by Anthony Campione (Amended Complaint, Paragraph 447) include the Superior Court, Law Division, *Campione v. Adamar*, 274 N.J. Super. 63, 80 (Law. Div. 1993) (branding the argument "specious"), the Appellate Division, *See Campione v. Adamar*, 302 N.J. Super. 99, 113-114 (App. Div. 1997), the Supreme Court, *See Campione v. Adamar*, 155 N.J. 245, 250, 256, 259 (1998), the District Court (Pet. App. 53-54), the Third Circuit (Pet. App. at 11-25), and the CCC, branding it "absurd". 31 N.J. Reg. 556 (Feb. 16, 1999); n.4 *infra*.

(the "Firm") had represented any of the defendants, mentioning that Petitioners had seen no such information in his biography in Martindale-Hubble. Motion, Exhibit A.

The question concerning consulting work for the CCC or DGE was essentially frivolous given the nature of those agencies. The CCC has quasi-legislative and quasi-judicial jurisdiction under the Act to promulgate regulations and to decide all contested matters. N.J.S.A. 5:12-63. Other than the release of certain financial information, virtually all other information in the possession of the CCC is confidential. N.J.S.A. 5:12-74(d-e); N.J.A.C. 19:40-4.1 *et seq*. The CCC also has its own "Office of General Counsel, which shall render legal advice to the Chairman and the [CCC and] represent the Commission in litigation . . ." N.J.A.C. 19:40-2.1(c)(5)(ii). Similarly, the DGE is vested with the quasi-executive power to prosecute all violations of the Act before the CCC (N.J.S.A. 5:12-76), is supervised by a Director, reporting to the Attorney General (N.J.S.A. 5:12-55), and is staffed from the Department of Law and Public Safety and the State Police as determined by the Attorney General. Any reasonable person would have known it was extremely remote that the CCC or DGE with plenary legal staff and confidential documents would have retained Judge Irenas as a consultant when he was in private practice.

Judge Irenas responded promptly on March 16, 2000, advising that he had not performed consulting work for the CCC or DGE or represented either agency or their individual members. Motion, Exhibit B at 1. Although stating that he could not say for sure given the size of the Firm,[2] Judge

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2. By this time, Judge Irenas had been on the bench for nearly eight years.

Irenas also stated that no member of the Firm represented either the CCC or DGE or their members other than one member of the CCC approximately 20 years earlier. *Id.* Finally, Judge Irenas stated that he was unaware of any conflict that had arisen due to his membership in the Firm, but mentioned that he had represented Playboy Enterprises, Inc. ("PEI") before the CCC in connection with the divestiture of its interest in a casino after PEI had become unlicensable. *Id.* at 1-2.[3]

The Motion also included letters dated May 5 and 10, 2000 between a Ken Wiseman and a partner at the Firm. Motion, Exhibits E-F. The subject matter was the possible representation by the Firm of Wiseman's business in obtaining a license to conduct business with casinos. An entity providing goods or services to a casino is a casino service industry (N.J.S.A. 5:12-12) ("CSI") subject to licensing pursuant to N.J.S.A. 5:12-92 in contrast to casinos, whose license requirements are set forth at N.J.S.A. 5:12-82-88. The partner at the Firm extolled the expertise of the Firm in an effort to get the work. In the first letter, the partner mentioned prior work for gaming companies to obtain casino licenses and for several CSI licensees. The second letter was written in response to a message from Wiseman to provide further information. The prior casino licensee work was described as the unsuccessful efforts to obtain licensure for PEI; the CSI licensing work was described as about one

3. In April 1982, the CCC ordered PEI to divest its interest in the Playboy Casino and approved the divestiture agreement in March 1984. *In re Elsinore License Renewal*, 11 N.J.A.R. 382, 396 (CCC, April 14, 1986). The casino, renamed the "Atlantis", was ordered closed by the CCC in May 1989 and shortly thereafter the principal assets of the bankruptcy estate were sold to a third party. *In re: Elsinore Shore Associates*, 102 B.R. 958, 960 n.3 (D.N.J. 1989).

a year; and work "on several occasions" for lenders to casino licensees was mentioned. Motion, Exhibit F at 1-2. This correspondence including the unsuccessful efforts for PEI was consistent with Judge Irenas' letter of March 16, 2000 and presented no basis for disqualification because no person with whom Judge Irenas previously practiced law "served during such association as a lawyer concerning the matter" in controversy. Section 455(b)(5); *Easley v. University of Michigan*, 853 F.2d 1351, 1358 n.5 (6th Cir. 1988) (in matter concerning law school, patently insufficient that judge's sons were member of judge's former firm whose clients included University of Michigan Hospital).

Bond work performed on behalf of the Casino Reinvestment Development Authority ("CRDA") was also identified in the Firm resume on Public Finance attached to the Motion as Exhibit G. Casinos pay an 8% gross revenue tax to the CCC (N.J.S.A. 5:12-144(a)), which is dedicated to certain programs for the benefit of senior citizens and the disabled. N.J.S.A. 5:12-145. Quarterly deposits of 1.5% of gross revenues are made to the State Treasurer for the benefit of the CRDA (N.J.S.A. 5:12-144.1(a)(2)), a separate administrative agency (N.J.S.A. 5:12-153), whose purpose is sponsoring redevelopment projects with that revenue stream (N.J.S.A. 5:12-160), and which takes the funds on deposit and issues its bonds to casino licensees in return. N.J.S.A. 5:12-162. Thus, the bond work for the CRDA put the Firm on the other side of the table from casinos.

The Motion also included the Financial Disclosure form for Judge Irenas for 1997 as Exhibit H. That disclosure was unremarkable, listed holdings of certain New Jersey State and Municipal Bonds at 2-4 and explained at 5-6 that a KEOGH Retirement Plan had been maintained on his behalf

by the Firm, but that upon his withdrawal from the Firm his interest in the Plan was segregated into a separate account managed by Judge Irenas until 1996 when the account was required to be deposited and managed by funds offered by Fidelity Investments.

Petitioners also mentioned in their Brief in Support of the Motion at 7-8 and repeat here (Pet. at 7-8) that Judge Irenas' blackjack playing prior to becoming a judge may have been a source of extra-judicial knowledge regarding the case. That Judge Irenas played blackjack prior to becoming a judge meant only that he might have been more familiar with New Jersey law than another judge. "It is no exaggeration to state that the Commission's regulation of blackjack is more extensive than the entire administrative regulation of many industries." *Uston v. Resorts Int'l Hotel, Inc.*, 89 N.J. 163, 169 (1982); N.J.A.C. 19:47-2.1-2.22. As stated by Judge Irenas at Pet. App. at 81, the rules require the dealer to take a hit at 16 and hold at 17. N.J.A.C. 19:47-2.12(b).[4] In sum, the reasons the Third Circuit denied the Motion are apparent.

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4. The contention that Respondents violated the Act by not providing Petitioners with complimentaries is a frivolous assertion, requiring only logic to reject. Pet. at 7; Pet. App. at 25,44,64. Given to induce play, complimentaries are items or services provided free or at a reduced cost (N.J.S.A. 5:12-14a) such as rooms, food and beverages. N.J.S.A. 5:12-102(m). Respondents had no interest in inducing the play of these admitted card counters. Pet. App. 38-39. Here, the regulations of the CCC authorized the Respondents to engage in counter-measures to discourage their play. N.J.A.C. 19:47-2.5(a) (shuffle at-will after any round of play); N.J.A.C. 19:47-2.14 (discretion to limit player to one betting spot); N.J.A.C. 19:47-8.2(b) (discretion to limit a card counter to the posted table limit and let others bet above the limit); *Doug Grant Inc. v. New Jersey Casino Control Commission*, Nos. A-3605-98T3, A-999-99T3 (N.J. Super. App. Div., April 16, 2001) (no basis for challenge to these regulations).

III.

THERE IS NO CONFLICT WITH THIS COURT'S PRECEDENTS.

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) is procedurally and factually distinct. Procedurally, the District Court tried the case without a jury. *Id.* at 850. Here, only legal issues were presented on a F.R. Civ. P. 12(b)(6) motion over which the Third Circuit exercised plenary review. Factually, the Respondent learned 10 months after the original judgment had been affirmed that the District Judge had been a member of the Board of Trustees of a university, which was interested in the outcome of the case. 486 U.S. at 850. Here, the Third Circuit found the Motion "without merit."

Easley v. University of Michigan, 853 F.2d 1351 (6th Cir. 1988) supports the legal result reached here and differs markedly on the facts. First, as noted above, the work revealed in the Firm's letters would not warrant disqualification of Judge Irenas based on Section 455 or *Easley*. Disqualification would have been required only if the lawyer with whom Judge Irenas "previously practiced law served during such association as a lawyer concerning the matter" in controversy. Section 455(b)(5); *Easley*, 853 F.2d at 1358 n.5. No such prior associations were demonstrated here. Second, although some claims were dismissed by the District Court on motion, the District Court conducted a bench trial prior to dismissing plaintiff's equitable claims. *Id.* at 1354-55. Also, unlike here where the Motion was found to be "without merit", the Judge in *Easley* was a member of the law school defendant's "Committee of Visitors", which the Court found "most

potentially troublesome". *Id.* at 1357. Under these facts, the Court determined that the fact that the legal decision "might" be legally correct would not moot the matter. *Id.*; *Accord Health Serv. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 801 (5th Cir. 1986), *aff'd*, 486 U.S. 847 (1988) (appearance of impropriety not lessened by fact litigation would have come out the same anyway). Here, there was no legal doubt expressed by the Third Circuit, the state courts or the CCC in rejecting the core claim regarding shuffling at will.

IV.

THE MISREPRESENTATIONS CONTINUE UNABATED HERE.

The Petition should also be denied due to factual misrepresentations. The misrepresentations begin with the "Question Presented" and in the statement of "Constitutional and Statutory Provisions". There were neither "serious conflicts" that "only became known during the pendency of an appeal . . ." nor a "conflict of interest arising from the prior representation of defendants . . ." No such record was presented to the Third Circuit, which found the Motion "without merit" and that Petitioners had otherwise engaged in "dramatic hyperbole" and "mischaracterized the facts." Pet. App. 24, 34. Second, the letters from the Firm did not contradict Judge Irenas and did not reveal that the Firm was engaged in a "wide range of casino related issues". Pet. at 3. Petitioners inquired whether Judge Irenas had represented the Respondents or performed consulting work for the CCC or DGE. Judge Irenas responded in the negative and mentioned old work related to the defunct Playboy Casino. Motion, Exh. A,B. Petitioners know that the Firm's prior work on behalf of PEI, one case a year on behalf of CSI

applicants or work on behalf of lenders neither pertained to this case nor could be described as wide ranging. Third, trying to link their case to non-existent casino licensing advice given by the Firm, Petitioners state (Pet. at 5) that their complaint alleged violations of "Section 99" and refer to the record at Pet. App. 14a, 48a. Here were two misrepresentations. N.J.S.A. 5:12-99 requires certain internal controls regarding casino operations to be submitted to the CCC for approval. This prior approval requirement for internal controls is world's apart from the licensing requirements set forth at N.J.S.A. 5:12-82-88, but sounds good coupled with a false insinuation that the Firm provided casino licensing advice to the Respondents. The citation to the record also misleads because the reference is to a conclusion that Respondents had implemented a countermeasure through approved internal controls. Fourth, despite Petitioners' contention (Pet. at 8), Judge Irenas' disclosure that he had played blackjack had nothing to do with the receipt of the Firm's letters. That advice was provided by Judge Irenas in April 1998 (Pet. App. at 81) and was unrelated to the type of work performed by the Firm. This is by no means an exhaustive list, but is enough to show that the pattern recognized by the Third Circuit (Pet. App. at 24) continues here.

CONCLUSION

For the foregoing reasons, the Sands respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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